IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.203 OF 2007
IN
NOTICE OF MOTION NO.3010 OF 2006
IN
L.C. SUIT NO.1220 OF 2006

1. Shankar Ramji Panchal
2. Vishnu Ramji Panchal
3. Rajesh Sunder Panchal
4. Mrs. Kikeben Dattu Panchal ..**Appellants**

(Orig.deft.Nos.2,3,5 & 6)

Versus

1. Homeland Realtors & Developers **(Org.Plff.No.1)**
2. Pankaj S. Parikh **(Org.Plff.No.2)**
3. Naresh Ramji Panchal **(Org.Deft.No.1)**
4. Arjun Ramji Panchal **(Org.Deft.No.4)**

(since deceased)

4(a) Mrs. Aruna Arjun Panchal
4(b) Mrs. Smita Sunmukh Patel
4(c) Jignesh Arjun Panchal
4(d) Dignesh Arjun Panchal
4(e) Ms. Kalpana Arjun Panchal

5.Smt.Premiben Bajrangbhai Sadhu **(Org.Def.No.7)**
6.Smt.Savitaben Vithalbhai Dalvi **(Org.Def.No.8)**
7.Smt.Vanitaben Kashinath Bamne **(Org.Def.No.9)**
8.Smt.Jasaben Narayanbhai Bhoir **(Org.Def.No.10)**
9.Smt. Kamuben Shankar Vaniya **(Org.Def.No.11)**

10.Smt.Vasantiben Dayaram
Patel **(Org.Def.No.12) ...Respondents**

S/Shri R.D. Soni with A.R. Shaikh for the Appellants
S/Shri V.A. Thorat, Anil C. Singh i/b. D.R. Shah for Respondent Nos. 1 and 2.

CORAM : S.R.SATHE,J.
DATED : 03/10/2007

ORAL ORDER :-

1. The Appellant-original defendant Nos.2,3,5 and 6 in L.C. Suit No.1220 of 2006 have preferred this appeal against the order passed by the Judge, City Civil Court, Greater Bombay in Notice of Motion No.3010 of 2006 whereby the said defendants were restrained from obstructing Plaintiffs or their agents or contractors in carrying out any development and construction in the suit property i.e. Survey No.21, Hissa No.2 (P) and Survey No.23, Hissa No.8(P), CTS No.564 (P) and 568 (P) of village Valnai, Taluka Borivali, Mumbai till the disposal of the suit. Accordingly, the said defendants were also restrained from creating any third party interest in the suit property during the pendency of the suit and the senior Inspector, In-charge of Malad Police Station was directed to give necessary assistance to Plaintiffs in

implementing the said order dated 12/02/2007. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

Plaintiff No.1 is a company registered under the Indian Companies Act, 1956. The Plaintiff No.2 is the Director of Plaintiff No.1 Company. The suit property mentioned above was originally owned by one Akhiraj Nemichand Shah and his name was appearing in the 7 x 12 extract of the suit property. The present defendants are heirs and legal representatives of one Ramji Merwan Panchal. Akhiraj had filed Ejectment Application in Small Causes Court bearing No. EA-500 of 1967 against the said Ramji Panchal. As per the order passed in the said application Ramji was directed to vacate the property i.e. land with structures on or before 31/12/1970. However, thereafter, Ramji filed Suit No.7095 of 1975 in the City Civil Court, Bombay claiming injunction and restraining the owner from executing the decree passed in EA-500 of 1967 and also prayed for the declaration that he has became the owner

of the suit property by an adverse possession. However, the said suit was dismissed in the year 1994. Not only that but the first appeal filed by Ramji against the said decree was also dismissed. However, in the mean time, Ramji had executed an agreement for sale/development in favour of original Plaintiff No.1 (in favour of Mohanlal Joshi and Khemichand Baphana, Directors of Plaintiff No.1) alongwith irrevocable power of attorney dated 24/06/1988. Similar agreement was also executed on 05/05/1988 by Ramji and he issued a letter dated 23/06/1988 in favour of Directors of Plaintiff for having handed over the possession of the land bearing Survey No.564 and 568.

3. On 11/10/1988, Akhiraj Nemichand, original owner of the suit property agreed to sale the suit land to Plaintiff alongwith the execution of power of attorney dated 12/10/1988. Thereafter, Ramji Merwan Panchal executed a Will dated 31/01/1989 and agreed for having entered into an agreement with Plaintiff and executed Power of attorney in favour of his son Naresh to receive money and execute necessary document in respect of the suit land bearing Nos.564, 567, 568 and

569. The original sale deed executed was actually registered on 12/04/1993. The CA of Ramji, namely, Naresh Ramji Panchal agreed to have received full and final payment and having handed over the possession of the suit property to Plaintiffs.

4. However, in the year 1994, as the defendants started removing the sign boards of Plaintiff from the suit property and creating obstruction in development, the Plaintiff No.1 filed S.C. Suit No.206 of 1994 in the City Civil Court, Mumbai and prayed for injunction against the defendants restraining them from removing the sign board and creating any third party interest in the suit property. Temporary injunction was also granted against the defendants in the said suit.

5. On 17/08/1994, in the execution proceeding initiated on the basis of the decree passed in EA-500 of 1967, 37 obstructionists obstructed for the execution. However with the police help, Bailiff executed the decree regarding handing over the possession and thus, Plaintiffs received possession of the land. They were also put in possession of the six

structures. Thereafter, out of 37 obstructionist, Plaintiff settled with 31 obstructionist who either accepted the compensation and vacated their respective portion and/or agreed for alternate accommodation.

6. When the Plaintiffs suit No.260 of 1994 was pending the Plaintiff had negotiations with defendants and defendants agreed to settle the matter. Hence, Plaintiff withdrew the suit on 07/12/1999 and defendant Nos. 2 to 6 executed an agreement dated 20/01/2000 in favour of Plaintiff. By virtue of the said agreement, the said defendants had agreed to co-operate Plaintiff in complying the terms and conditions of the agreement and carrying out development. However, defendant Nos. 2 to 6, vide their letter dated 16/12/2005 and 10/01/2006 terminated agreement entered into, Plaintiffs, therefore, denied the allegations in the notice by giving reply through Advocate. Plaintiff had in fact obtained necessary permission for carrying out development on the suit property. The structure occupied by the defendants is partly on the suit property and partly on the adjacent plot. The said structure has only ground floor and it is in the nature

of a chawl. The defendants started creating obstructions in carrying out the development and they started putting their women folk to create obstruction in the development work by alleging that Plaintiffs and their workers are guilty of molestation and also gave threat that they would lodge complaint against Plaintiffs and they will be arrested. Thus, according to Plaintiff, the defendants started causing embarcement and nuisance to them. Hence, Plaintiffs filed the present suit i.e. L.C. Suit No.1220 of 2006 for permanent injunction restraining defendants from obstructing the Plaintiff's possession and/or interfering in the work of development and construction in the suit property. They also prayed for injunction restraining defendants from creating third party interest in the suit property.

7. The Plaintiffs also filed Notice of Motion No.3010 of 2006 and prayed for temporary injunction in above terms.

8. The defendants filed their reply to the said Notice of Motion and opposed the same. After hearing

the arguments of both the learned Advocates and considering the documents filed by the parties, Judge, City Civil Court Bombay granted temporary injunction against defendants on 31/07/2006. The defendant No.2 and others filed AO-633-2006 and challenged the said order. The grievance was made that no sufficient opportunity was given to the defendants to put forward their case and to produce necessary documents. Hence, this Court by order dated 18/09/2006 remanded the matter for rehearing of Notice of Motion No.3010 of 2006. Accordingly, after remand the defendant Rajesh Panchal filed another affidavit in reply and opposed the Notice of Motion. The said affidavit in reply was filed on behalf of present Appellant. The defendants firstly contended that they are adivasies and the suit land in question can not be transferred to any other person than adiwasies without prior permission of the collector and alleged agreement and transaction of sale are bad in law in view of the provisions of Section 36 of the Maharashtra Land Revenue Code. Secondly, the defendants contended that Plaintiffs had filed similar suit bearing No.260 of 1994 but they withdrew the same unconditionally and as such the present suit is barred

by the provisions of Order-23 Rule-4 of the Code of Civil Procedure. The defendants also contended that Plaintiffs are claiming right in the suit property under the agreement which are already terminated and as such the present suit is not maintainable particularly when Plaintiffs are not seeking any specific performance of the said agreement. According to them, there is also no privity of contract between Plaintiffs and them or their father. Late Ramji had entered into an agreement of development with Mohan Joshi and Bafana and not with Plaintiffs. The defendants also contended that Plaintiffs are in fact not in possession of the suit land and the alleged agreement between Plaintiffs and Ramji is forged agreement. Besides this, according to defendants, commencement certificate as well as IOD obtained by the Plaintiffs are not revalidated. According to them, the present Plaintiff No.2 was in fact, not entitled to file the present suit and the same is bad in view of the provisions of Section 291 of the Companies Act and Order-29 of CPC. The defendants therefore contended that Plaintiffs have not made out any prima facie case and the balance of convenience is also not in their favour. Hence, on all these grounds

the defendants prayed for the dismissal of the Notice of Motion.

9. The learned Judge, City Civil Court after hearing arguments of both the sides and considering documents on record came to the conclusion that the suit filed by the Plaintiffs is maintainable and they have made out a prima facie case for granting temporary injunction and the balance of convenience is also in their favour. Naturally, he granted temporary injunction against defendants as mentioned earlier.

10. The above mentioned order of temporary injunction is challenged by the Defendant Nos.2,3,5 and 6 in the present appeal. Admittedly, all other defendants i.e. defendant Nos.1,4,7 to 12 have settled the matter with Plaintiffs.

11. In this appeal before me, Shri Soni, learned Advocate for the Appellants-defendants has urged several points. Firstly, he submitted that suit filed by the Plaintiffs is not in accordance with law and Plaintiff No.2 had in fact no right to file the present

suit on behalf of Plaintiff-company and the same is bad in view of the provisions of section 291 of the Companies Act. Secondly, he canvassed before me that earlier Plaintiffs had filed similar suit bearing No.260 of 1994 but they withdrew it without permission and as such the present suit is barred in view of Order-23, Rule-4 of CPC. Thirdly, he argued before me that the alleged agreement executed by Ramji is not signed by Ramji. It is forged one and even if it is held that it is not forged, the same is terminated. Lastly, he submitted that defendants are Adivasies and as such the land in question can not be transferred to any other person without prior permission of the Collector and if such transaction is entered into, it is hit by the provisions of Section-36 of the Maharashtra Land Revenue Code. Lastly, he submitted that the learned Trial Judge has not properly applied his mind and has proceeded on the wrong footing that his earlier order passed prior to remand was not set aside on merits and it was confirmed by the High Court. According to learned Advocate for the defendants merely because the other occupants of the suit structure have compromised with Plaintiff, they are not bound to

compromise the matter and the present defendants are in fact in possession of the suit property and they have got a right to obstruct the Plaintiffs in carrying out development. According to him, agreement executed with them has been cancelled or terminated by them and hence, Plaintiffs have failed to make out any prima facie case and the balance of convenience is also not in their favour. He also submitted that mere suit for injunction is not maintainable Plaintiffs ought to have filed the suit for specific performance of the agreement. He, therefore, submitted that the appeal be allowed and the Notice of Motion be dismissed.

12. As against this, Shri V.A. Thorat, learned Senior Advocate with learned Advocate Shri Anil Singh submitted that Plaintiffs are the owners of the suit property and as such it is not necessary for them to ask for declaration or seek specific performance. He also canvassed before me that the cause of action of the earlier suit No.260 of 1994 and the cause of action of the present are different and as such there is no question of application of Order-23, Rule-4 of CPC. Fourthly, he submitted that the provisions of BTAL Act

are not at all applicable to the suit land and there is no substance in the contention of the defendants that suit land can not be transferred in view of the provisions of Section-36 of the Maharashtra Land Revenue Code because application made by the defendants in this above has been already rejected by the Competent Authority. Lastly, he submitted that defendants have in fact no right, title and interest in the suit property. They have clearly admitted in the earlier agreement that Plaintiffs are in possession of the suit land. Besides this, Plaintiffs have in fact, settled the matter with other obstructionist and they are ready even to settle the matter with defendants-appellants and the Plaintiffs have in fact deposited an amount of Rs. 62 lakhs in the Trial Court and submitted undertaking whereby they have shown willingness to give alternate accommodation to the present Appellants. He, therefore, submitted that defendants are obstructing only with a view to harass the Plaintiffs and to secure more benefit and only with that intention they are creating nuisance. He, therefore, submitted that the order passed by the learned Trial Judge is legal and correct and the appeal be dismissed.

13. It is in fact not in dispute that he suit property was initially owned by one Akhiraj Nemichand Shah. Admittedly, he had filed Ejectment Application in Small Causes Court bearing No.500 of 1967 against the predecessor of the present defendant and it was decreed in favour of Akhiraj. It is also very clear that on 17/08/1994 decree passed in the above mentioned proceedings was executed and bailiff handed over the possession of the part of open land (which was found empty and unoccupied) and recorded obstruction of 31 obstructionist. Now it is an admitted position that the present Appellants i.e. original defendant Nos.2,3,5 and 6 are only raising obstruction to Plaintiffs. It is also an admitted position that Plaintiffs are claiming right to the suit property on the basis of the Conveyance Deed as well as on the basis of the agreement executed by Ramji in their favour as well as an agreement executed by the Appellant dated 17/01/2000.

14. It is the case of defendants that the present Plaintiffs have no right to file the present suit and

Plaintiff No.2 was not authorized for filing such suit. However, Plaintiffs have produced the necessary copy of the resolution showing that Plaintiff No.2 is entitled to file present suit. Besides this, we also can not ignore the fact that Plaintiff No.1 is a Company. So, suit is in fact filed by the Company and under the circumstances at this stage it can not be said that the suit is bad in view of the provisions of Section-291 of the Companies Act.

15. The learned Advocate for the defendant tried to argue before me that defendants are Adivasies and as such it was essential for the Plaintiffs to secure permission of the Collector prior to entering into transaction of the suit land, and as such permission is not granted, the suit is bad in view of the provisions of Section-36 of the Maharashtra Land Revenue Code. It is worthwhile to see what section-36 says. It runs as follows :-

> ***"36. Occupancy to be transferable and heritable subject to certain restrictions:-***

(1) An occupancy shall, subject to the provisions contained in Section 72 and to any conditions lawfully annexed to the tenure, and save as otherwise provided by law, be deemed an heritable and transferable property.

(2) Notwithstanding anything contained in the foregoing sub-section occupancies of persons belonging to the Scheduled Tribes (hereinafter referred to as the 'Tribals')(being occupancies wherever situated in the State), shall not be transferred except with the previous sanction of the Collector :

Provided that nothing in this sub-section shall apply to transfer of occupancies made in favour of persons other than the Tribals (hereinafter referred to as the 'non-Tribals') on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws

(Amendment) Act, 1974."

16. Firstly, it must be noted that as there is no conclusive evidence to show that defendants are adivasies, the provisions of Section-36 are in fact not applicable to the facts of the present suit. Moreover, it is very clear that the application made by the defendants in this behalf is rejected by the Competent Authority. It was argued on behalf of the defendants that the Commissioner has passed order with regard to statusquo in appeal filed before him. However, the said order is too vague and one is certainly not in a position to hold at this stage that the provision of Section-36 are applicable to the facts of the present case. Moreover, for that purpose, it is not necessary to stop the development process. At the most it can be said that the said process would be subject to the decision of the appeal which is pending before the Commissioner.

17. Learned Advocate for the defendants submitted that earlier Plaintiffs had filed L.C. Suit No.260 of

1994 for permanent injunction. Though, temporary injunction was granted in the same against defendants finally, Plaintiffs withdrew the said suit without seeking permission to file fresh suit on same cause of action and as such the present suit is not maintainable. However, firstly it must be noted that the earlier suit was for injunction. Though, the present suit is also for permanent injunction cause of action for the same has arisen subsequently. Naturally, when the subject matter and the cause of the suit in the earlier suit No.260 of 1994 and the cause of action and the subject matter of the suit in the present suit are different, there is no question of application of order-23, Rule-4 of CPC. So, there is no substance in the arguments advanced by the learned Advocate for the defendants in this behalf.

18. A feeble attempt has been made on behalf of the defendants to show that Ramji was protected tenant in the suit land and as such the provisions of Bombay Tenancy and Agricultural Land Act are applicable to the facts of the present suit. Admittedly, the contentions raised by Ramji with regard to this point have been

negatived by the Revenue Court and it has been held that the provisions of BATL Act are not applicable to the suit property. In fact, in the agreement which is executed by the defendants on 17/01/2000 in favour of Plaintiffs in Clause-J, defendants have admitted that the provisions of BTAL Act are not applicable to the suit property. So, having admitted the said position, now defendants are in fact estopped from raising the said contentions. Thus, these circumstances show that defendants are bent upon opposing the Plaintiff in carrying out the development and to create hurdle in one way or the other.

19. It is pertinent to note that the Sale Deed executed by original owner Akhiraj Nemichand Shah is duly registered. Merely because it is registered after laps of considerable time from the date of execution, one can not jump to the conclusion that the same is not legal and valid. On the contrary, it does appear that the said Sale Deed was presented for registration after its execution but the actual registration was done after lapse of considerable time. In any event, at this stage one can not jump to the conclusion that the said

Sale Deed is not legal and valid. On the contrary, due weightage shall have to be given to the said registered deed where from it is very clear that Plaintiff Company has acquired title. It is not in dispute that the person in whose favour Sale Deed was executed were directors of Plaintiff Company. So, prima facie it is clear that Plaintiffs are having title to the suit property. Under such circumstances, it is not necessary for the Plaintiffs to file suit for specific performance or even a suit for declaration of their title. Hence, I am not inclined to accept the arguments advanced by the learned Advocate for the defendants that mere suit for permanent injunction in the absence of any relief with regard to specific performance or declaration of title is not maintainable.

20. Plaintiffs have produced on record the report submitted by Bailiff in the execution proceedings. From the perusal of the same, it is quite evident that possession of the open land was given to Plaintiffs. What is more to be noted is that even in the agreement which is executed on 17/01/2000 by defendants including Rajesh Sunder Panchal, the main contesting defendant in

the present suit has clearly admitted that Plaintiffs have received the possession of the open land in execution proceedings. Not only that, but it does appear that defendants including present defendant No.2 Rajesh Panchal have clearly admitted that the Conveyance Deed dated 12/04/1993 executed by Akhiraj Nemichand Shah in favour of assignees is valid and subsisting. Plaintiffs have in fact received the possession of the entire land under the said agreement. It is worth to note that in this agreement dated 17/01/2000 the present defendant No.2 and others have also specifically stated, agreed and undertaken that they and their family members shall co-operate with the Plaintiffs in developing the said property and shall not create any obstruction in the construction activities. When such is the position, now the present defendant Nos. 2,3,5 and 6 are in fact not entitled to create any obstruction to Plaintiffs in carrying out development.

21. It was tried to be argued on behalf of the defendants that the signatures on the agreement are fabricated and the same are not of their predecessor

Ramji. However, it must be noted that in the agreement dated 17/01/2000 when defendants and in particular the main contesting defendant No.2 Rajesh have admitted execution of the agreement by their predecessor Ramji and handing over of the possession of the suit property to Plaintiffs, it is clear that the contention that the signature is not of Ramji is nothing but after thought. Besides this, if really it was the grievance of the defendants that Ramji has not executed any agreement and his signatures were obtained by the Plaintiffs by fraud, it was essential for the defendant to bring some evidence on record which would prima facie show that there is any substance. But that has also not happened. So, under the circumstances, it must be held that defendants have taken the said contention only with a view to oppose the Plaintiffs' claim. At this stage, I am not inclined to accept the said contentions.

22. Shri Soni, learned Advocate for the defendants argued before me that in the instant case, IOD and commencement certificate issued in favour of the defendants are also not revalidated and as such defendants are not entitled to carry out any

development and seek injunction in that behalf. In order to substantiate this proposition he has also placed reliance on Section-48 of the Maharashtra Regional and Town Planning Act, 1966. The said section runs as follows :-

> ***"48. Lapse of permission - Every permission for development granted or deemed to be granted under section 45 or granted under section 47 shall remain in force for a period of one year {from the date of receipt of such grant}, and thereafter it shall lapse:***
>
> ***Provided that, the Planning Authority, may on application made to it extend such period from year to year, but such extended period shall in no case exceed three years :***
>
> ***Provided further that, such lapse shall not bar any subsequent application for fresh permission under this Act."***

23. It is true that as per this provision no development can be carried out unless there is valid permission of the competent authority. However, it was argued on behalf of the Plaintiffs that they have renewed the permission from time to time and even if the said permission has lapsed then also they would obtain necessary permission and then carry out the

development but that would not give any right to defendants to obstruct the development activity, particularly when they have no legal right in that behalf. It must be noted that the real dispute between the parties is whether defendants have any legal right to obstruct Plaintiffs in carrying out development. Whether defendants have shown that Plaintiffs are under certain legal obligations vis-a-vis defendants and the said legal rights of the defendants have been infringed by the defendants or they have failed in performing their obligation. If it is so, then only defendants are entitled to obstruct the Plaintiffs in the development activity. Considering this aspect even if we assume for the sake of arguments that as on today there is no valid I.O.D. or C.C. in favour of defendants then condition to that effect can be imposed while granting discretionary relief of temporary injunction. But that would certainly not give right to defendants to obstruct the development on that count, particularly when they have specifically admitted Plaintiff's right and assured them that they would not create any obstruction but would on the contrary co-operate Plaintiffs in development. Hence, there is no substance

in the arguments advanced by the learned Advocate for the defendants in this behalf. Thus, if we take into consideration the above mentioned facts and circumstances of the case, the material on record and the position of law then it is very clear that the Plaintiffs have made out a prima facie case for granting temporary injunction as prayed for. If such injunction is not granted then certainly the entire development work will be stopped. Huge investment made by the defendants would remain ideal, Plaintiffs would not get returns of the same. It must be noted that out of 37 initial obstructionists most of them have settled the matter with Plaintiffs. Out of the present 12 defendants only 4 defendants are now opposing the Plaintiffs. Plaintiffs have deposited the amount of Rs.62 lakhs in the Court and have given undertaking that they are even ready to give alternate accommodation to the defendants. Considering all these facts, it must be said that Plaintiffs have shown that balance of convenience is in their favour. If injunction is not granted, irreparable loss is likely to be caused to the Plaintiffs. As against this, if temporary injunction as prayed for is granted and if

ultimately defendants succeeded in the suit then also it can not be said that they would suffer any loss much less irreparable loss. On the contrary, no prejudice is even likely to be caused to the defendants if interim injunction as prayed for is granted.

24. In view of the above discussion, I think that the discretionary order of temporary injunction passed in favour of Plaintiffs by the learned Trial Judge can not be said to be arbitrary or capricious. It is well settled that the Appellate Court should not interfere with the discretionary order passed by the Trial Judge unless the same appears to be perverse and arbitrary. Thus, looking to the case from any angle it is very clear that there is no substance in the present appeal. Hence, I pass the following order :-

O R D E R

Appeal is dismissed with costs.

However, Plaintiffs to carry on the development only on the basis of the valid I.O.D. and C.C.

At this stage, the learned Advocate for the Appellant submits that initially this Court has granted

status-quo and the same be extended for further period of 8 weeks. Hence, with a view to give opportunity to the Appellant to redress their grievance if any before the Higher Court the earlier order with regard to status-quo is to continue for further period of 4 weeks from today.

(S.R.SATHE,J.)